STATE OF MICHIGAN

COURT OF APPEALS

KENNETH A. KOSOWSKI,

Plaintiff-Appellant,

v

ANDREW J. HALIW, III, HALIW, SICILIANO & MYCHALOWYCH, P.C., DENNIS MAKOWSKI and MARLENE MAKOWSKI, Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED
January 5, 1999

No. 203419
Oakland Circuit Court
LC No. 94-489194 NM

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm in part, reverse in part, and remand for further proceedings.

In 1987, defendant Dennis Makowski was convicted of racketeering in the distribution of narcotics and was forbidden to be employed for five years by any business that participated in Medicaid. Plaintiff was aware of Dennis Makowski's conviction. During this time, defendant Andrew Haliw had an attorney-client relationship with defendants Marlene and Dennis Makowski and plaintiff Kenneth Kosowski. In August 1985, Haliw organized IDC Pharmacy, Inc, a corporation, with plaintiff as its only shareholder. The corporation performed no business operations until it acquired a franchise for operating a home infusion franchise through O.P.T.I.O.N Care, Inc. in February 1990. At that time, IDC issued stock to plaintiff, defendant Marlene Makowski, defendant Dennis Makowski (as de facto shareholder with or in the shoes of Marlene Makowski), and a third person. Dennis Makowski, allegedly at the recommendation of Haliw, was employed by the corporation to run its third-party payor billing, including billings to Medicare and Medicaid. Subsequently, Dennis pleaded guilty to a criminal charge of submitting a false claim to the State of Michigan's Medicaid program, and the corporation was prosecuted for Dennis' actions.

Plaintiff filed the instant complaint claiming breach of fiduciary duties, professional negligence (conflict of interest), breach of fiduciary duties (fraud), conspiracy/concerted action, failure to supervise, respondeat superior; and fraudulent nondisclosure. Plaintiff alleged that defendants' actions caused a diminution of value to his stock, forced him to purchase various assets from IDC, caused him to incur legal fees, and caused him to suffer extreme emotional distress.

Defendants filed motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) arguing that plaintiff did not have standing to bring suit. The trial court granted defendants' motions for summary disposition, ruling that plaintiff could not maintain the action in his individual capacity as the injuries he alleged were merely incidental to the alleged injuries that the corporation suffered. Plaintiff filed a motion for reconsideration that the trial court denied.

On appeal, plaintiff first argues that the trial court erred in denying his motion for reconsideration/rehearing because he has standing to bring the causes of actions listed in his complaint. This Court reviews a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). Pursuant to MCR 2.119(F)(3), a motion for reconsideration must demonstrate a "palpable error" that misled the court and the parties. A motion that merely presents the same issue as ruled on by the court, either expressly or by reasonable implication, will not be granted. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989). We review de novo a motion for summary disposition based upon the plaintiff's failure to state a claim upon which relief may be granted. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). In reviewing the grant of a motion for summary disposition under MCR 2.116(C)(8), we look to the pleadings, accept as true all factual allegations and their reasonable inferences, and uphold the grant where no factual development could possibly justify a right of recovery. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395-396; 516 NW2d 498 (1994).

An action must be prosecuted in the name of the real party in interest. MCR 2.201(B). "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991). The general rule is that a lawsuit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, cannot be brought in the name of a stockholder but must be brought in the name of the corporation. *Michigan National Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). We note, however, that

> [t]he general rule is inapplicable where the individual shows a violation of a duty owed directly to him. This exception does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally. Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party. [*Id.* at 679-680.]

We find that plaintiff, as an individual shareholder, does not have an action for redress of injuries *to the corporation*.[1] Although plaintiff argues that he falls within the exception to the general rule and defendants owed a duty to him, the exception does not arise for the *majority* of his claims because the acts complained of resulted in damage both to the corporation and to him. The exception does apply, however, to plaintiff's legal malpractice claims against defendants Haliw and Haliw's law firm given that the existence of an attorney-client relationship between plaintiff and Haliw predated the present corporation's creation.

Other than those damages traceable to legal malpractice, plaintiff's damages were not separate and distinct from the injuries that the other shareholders suffered. Clearly, the diminution in value of the stock was insufficient direct harm to give plaintiff standing to sue in his own right. See *Gaff v Federal Deposit Ins Corp*, 814 F2d 311, 315 (CA 6, 1987); *Warren v Manufacturers Nat Bank*, 759 F2d 542, 544-545 (CA 6, 1985), mod 933 F2d 400 (1991) (alleged acts of fraud were not directed at the plaintiff as a corporate employee but were directed at the corporation as a business entity; the fact that the employee lost his job in the corporate bankruptcy is insufficient to establish a direct harm peculiar to the plaintiff, so plaintiff had no standing to sue for the fraud).

But for Dennis Makowski's submission of false claims to the Medicaid program on behalf of the corporation, the corporation would still be viable and plaintiff would not have been forced to purchase IDC's assets. In addition, plaintiff would not have had to pay either the corporation's or his own legal fees if the corporation had not been sued as a result of the Medicaid fraud that Dennis Makowski committed. Even accepting plaintiff's well-pled allegations as true, he has not established that the money he expended in legal fees or the emotional distress he felt was unique to him or that it was due to the breach of a duty owed to him, not to the corporation, i.e., the raid and the criminal prosecution were stressful, embarrassing and expensive for all the shareholders. Put simply, Dennis Makowski was employed by IDC, not by plaintiff, and but for plaintiff's and Makowskis' business relationship as shareholders of the corporation, plaintiff would have suffered no damages. Indeed, plaintiff does not claim that he was ever personally sanctioned for employing Dennis at IDC or that he lost his pharmacist's license due to his involvement with Dennis or IDC. Therefore, plaintiff's injuries are at the most derivative, see MCL 450.1489; MSA 21.200(489), MCL 450.1491a; MSA 21.200(491a), and MCL 450.1493a; MSA 21.200(493a), and he does not have an individual right of action against defendants for the diminution of the value of his stock, his forced purchase of various assets of IDC (a fact that is only mentioned in passing but not explained in any detail)[2], his payment of legal fees (presumably to defend the corporation), and his emotional distress.

We believe, however, that plaintiff has standing to bring his legal malpractice claims against defendants Andrew J. Haliw and Haliw, Siciliano & Mychalowych, P.C. To establish legal malpractice, the plaintiff must prove the existence of an attorney-client relationship, the acts constituting negligence, the proximate cause between the negligence and the alleged injuries, and the fact as well as the extent of any injuries. *Scott v Green*, 140 Mich App 384, 399; 364 NW2d 709 (1985). Plaintiff alleged that Haliw's legal malpractice consisted of (1) failing to disclose that Dennis Makowski was not permitted to be employed by a company such as IDC, (2) failing to disclose facts from which plaintiff would have determined that it would be unwise to permit Dennis Makowski to have any connection with IDC, (3)

representing plaintiff when a conflict existed between his representation of plaintiff, IDC, and the Makowskis, and not advising plaintiff regarding the conflicts arising out of multiple representations, and (4) breaching his duties that caused plaintiff to enter into transactions that he would not have otherwise entered into or would have entered only upon much more favorable terms.

Upon reviewing the pleadings, we find that plaintiff's allegations establish the existence of an attorney-client relationship between plaintiff and defendants that is separate and distinct from defendant Haliw's actions with respect to IDC's home infusion service which are the genesis of plaintiff's malpractice claims. MCL 450.1493a; MSA 21.200(493a). Plaintiff apparently sought and first obtained defendant Haliw's legal advice in 1985 in order to establish IDC as a "shell" corporation with plaintiff as its sole shareholder. An attorney-client relationship therefore existed before IDC became involved in the home-infusion business and before the Makowskis became involved in the corporation. That independent attorney-client relationship existed apart from their subsequent involvement with IDC. Indeed, the fact that that defendant Haliw allegedly represented all the parties to the IDC home-infusion shareholder's agreement does not dilute this attorney-client relationship between plaintiff and defendants. Thus, summary disposition under MCR 2.116(C)(8) was inappropriate regarding defendant's legal malpractice claims because plaintiff has stated claims upon which relief may be granted, and he has standing to bring those claims.

Next, plaintiff argues on appeal that he should have been allowed to amend his complaint in the event the court found his action to be wholly derivative. In order for plaintiff to bring a derivative claim, however, MCL 450.1493a; MSA 21.200(493a) requires that:

> A shareholder may not commence a derivative proceeding until all of the following have occurred:
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> (a) A written demand has been made upon the corporation to take suitable action.
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> (b) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

Plaintiff did not address the requirements found in MCL 450.1493a; MSA 21.200(493a) in either his motion for reconsideration or in his appellate brief. Rather, plaintiff argues on appeal that defendants would not be surprised by the additional party because it did not add any additional claims and defendants would not be unfairly prejudiced. We find that the trial court did not abuse its discretion in finding that the proposed amendment would be futile because plaintiff failed to make any argument or present any evidence to the contrary. See, generally, *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Finally, plaintiff argues that defendants should have been barred from asserting the defense of plaintiff's lack of standing because this defense was not pleaded affirmatively and defendants did not

move to amend their responsive pleadings to assert it. The Michigan Supreme Court in *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992), resolved this issue contrary to plaintiff's position, however. In *Leite, supra*, the Supreme Court, in lieu of granting leave to appeal, vacated the judgment of this Court and held that this Court had erred when it interpreted MCR 2.116(D)(2) and MCR 2.111(F)(3) to require the defendant's affirmative defense that the plaintiffs were not the real parties in interest be raised in their first responsive pleading. Rather, our Supreme Court held that the defense that the plaintiffs were not and never were persons who possessed a cause of action against them, could properly be raised in a MCR 2.116(C)(8) or MCR 2.116(C)(10) motion. *Id.* at 920.

Although plaintiff argues that *Leite* is not binding because it is an order and not an opinion, the Supreme Court's peremptory orders are binding precedent when they can be understood. See *People v Edgett*, 220 Mich App 686, 693, n 6; 560 NW2d 360 (1996). The Supreme Court was clear when it stated in its order:

> Further, MCR 2.116(D)(3) permits certain other defenses to be raised at any time. The defense presented by the defendants in this case (a claim that the plaintiffs were not the real parties in interest) was properly raised by motion. MCR 2.11(F)(2), 2.116(D)(3).
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> * * *
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> A motion based on such a defense [lack of standing] would be within MCR 2.116(C)(8) or MCR 2.116(C)(10), depending on the pleadings or other circumstances of the particular case. [*Leite, supra*.]

Therefore, *Leite* is binding and defendants were not barred from asserting the defense of lack of standing for the first time in their motion for summary disposition pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] Plaintiff would have this Court establish a new rule of law: that is, in a closely-held corporation, if a group of shareholders act inappropriately as shareholders of the corporation and cause one other innocent shareholder to suffer the consequences of their inappropriate or illegal behavior, then the innocent shareholder can seek damages from the offending shareholders in a non-derivative action. Unfortunately, plaintiff fails to present this Court with case law or statutory authority to support the creation of this new rule of law.

[2] For example, we find nothing compelling about plaintiff's decision to purchase corporate assets assuming that plaintiff could use these in his continuing pharmaceutical practice. Plaintiff also fails to explain why he was "forced" to purchase the assets.